

U.S. ENVIRONMENTAL PROTECTION AGENCY

REGION X

1200 SIXTH AVENUE  
SEATTLE, WASHINGTON 98101



REPLY TO  
ATTN OF:

Mail Stop 613

December 20, 1983

Steve Schroeder, Esq.  
3600 Seafirst Fifth Avenue Plaza  
800 Fifth Avenue  
Seattle, Washington 98104

Re: Materials Subpoenaed in reference to Grand Jury Proceedings --  
Arrcom, Inc., Drexler Enterprises, Inc., George Drexler,  
Terry Drexler et al.

Dear Mr. Schroeder:

Pursuant to our recent telephone conversation, this letter renews the Environmental Protection Agency's request for access to certain material which was obtained by your office in response to a grand jury subpoena. As we discussed, EPA is proposing to administratively assess civil penalties against the referenced individuals and corporations for violations of the Resource Conservation and Recovery Act (RCRA).

EPA takes the position that our request does not violate the secrecy provisions of Fed. R. Crim P. 6(e) regarding "matters occurring before the grand jury" because we are not seeking grand jury transcripts, juror voting records, or other substantive grand jury material. The material which we do seek consists of pre-existing business records, hazardous waste manifests, or other material identifying assets, or generators of materials processed by the named entities. We believe that these documents were created for independent corporate purposes and generated in the ordinary course of business that happen to have been examined by a grand jury. To the extent that the material "occurred" before the grand jury, or reveals what occurred before the grand jury, it should be excised. This position is consistent with recent caselaw, however, to my knowledge the definition of "matters occurring before the grand jury" has not been squarely addressed by the Ninth Circuit. I have reviewed the cases briefly and provide the following citations in support of our position that there is no blanket exemption for materials examined by the grand jury: U.S. v. Noble Adjin Lartey, 716 F.2d 955 (2d Cir. 1983), Securities and Exchange Commission v. Dresser Industries, 628 F.2d 1368, (D.C.Cir.) (en banc), cert. denied, 449 U.S. 993 (1980), U.S. v. Weinstein, 511 F.2d 622, 627 n.5 (2d Cir.) cert. denied, 422 U.S. 1042 (1975); U.S. v. Stanford, 589 F.2d 285, 291 (7th Cir. 1978), cert. denied 440 U.S. 983 (1979), United States v. Interstate Dress Carriers, Inc., 280 F.2d 52, 54 (2d Cir. 1960).

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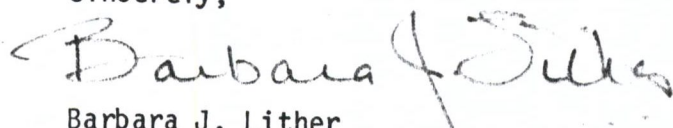
WASTE MANAGEMENT BRANCH

As I mentioned to you, the recent opinions of the United States Supreme Court in U.S. v. Sells Engineering Inc., et al., No. 81-1032, 51 U.S.L.W. 5059, June 30, 1983, and U.S. v. Baggot, No. 81-1938, 51 U.S.L.W. 5075, June 30, 1983, while regrettably using the "trade phrase", "...grand jury materials...", do not squarely address the definition of "matters occurring before the grand jury". The Baggot case indicates that the materials in issue were "grand jury transcripts and documents" without specifying what the "documents" were. The District Court apparently granted disclosure of some of the requested materials and held that others "occurred before the grand jury." The Court of Appeals for the Seventh Circuit reversed and held that "all" the materials sought, "with one possible exception", are matters which occurred before the grand jury, and remanded the matter to the District Court. The Supreme Court affirmed the Court of Appeals. Therefore, even though the factual nature of the documents is unknown, the Supreme Court has affirmed the position that at least some material may be disclosed even though it has been examined by a grand jury.

To eliminate any risk in allowing EPA access to these materials, your suggestion to seek a declaratory judgment is very interesting and worth pursuing. EPA would be happy with a simple court Order. I would be happy to assist you in whatever way you deem necessary to obtain access to these materials. There is some urgency to this request, as I anticipate we will be in administrative hearings on this matter shortly.

I can be reached days at (206) 442-4232. Thank you for your assistance in helping us obtain access to this material.

Sincerely,



Barbara J. Lither  
Assistant Regional Counsel